



NATIONAL FOOTBALL LEAGUE

Paul Tagliabue
Commissioner

July 27, 2004

The Hon. Kevin J. Martin
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Commissioner Martin:

I very much appreciate having the opportunity to speak with you yesterday about the TiVo interim certification application under the "broadcast flag" rules. I thought it would be useful to put my thoughts into a brief follow-up letter. (A copy of this letter will, of course, be placed in the TiVo docket file to comply with the FCC's *ex parte* rules.)

Like most content producers, the NFL supports the broadcast flag, and we do not want to slow down the technological innovation or migration of content to digital broadcast television that it is designed to encourage. However, the NFL believes that the TiVo system's ability to empower every subscriber to send digital programming out over the Internet to an "affinity group" that the TiVo subscriber himself defines as he sees fit needs to be limited until you adopt final rules. We further believe that proximity controls are the simplest and fastest way to implement these needed interim limitations, because the alternatives that we could suggest – such as security systems, affinity standards, and verification systems – really cannot be developed without the benefit of a full rulemaking record.

The TiVo interim certification proposal is a very important issue to the NFL, and to other content owners as well, because of the threat that TiVo's system design poses to the integrity of broadcast content copyrights unless and until proper standards to limit redistribution of that content are designed and implemented. We know that Jack Valenti on behalf of the studios and program producers is also calling on Commissioners to express their strong concerns about the technology that TiVo is currently proposing, which could adversely affect the studios' ability to sell broadcast programming in syndication, to cable channels, and directly to consumers via DVDs and the like.

The NFL's interest in this issue is different and unique. We rely on free, over-the-air broadcast television to distribute the bulk of our games. Typically, 12 to 14 of our 16 weekly games are played in two time windows on Sunday afternoons, and most of those games are distributed regionally by the broadcast

networks with which we contract. These telecasting patterns clearly serve fan and viewer interests and are the critical underpinning of the NFL's continuing commitment to broadcast television for its game programming.

Unlike most network television programming, however, not every viewer in the United States sees the same program at the same time because so many of our games are played simultaneously and telecast only regionally. As a result, (1) over the years we have had to litigate to shut down a number of schemes involving commercial showings of games illegally imported from other television markets, and (2) to satisfy fan demand for such games we have created a supplementary a la carte package of games (NFL Sunday Ticket) that is available to our fans through DirecTV. But even that supplementary package does not enable viewers to receive games that are blacked-out on the viewers' over-the-air stations because they are not sold out 72 hours in advance.

Our regional system, and our blackout rule, would be endangered if anyone with a new TiVo system could create an affinity group that includes commercial users and use the TiVo system to send one of our games out in "real time" to a large number of sports bars, dorms or households in other markets¹. We could even be forced to rethink our strong preference for keeping most of our games on free broadcast television if copy protection standards for that medium are substantially weaker than the "no-copy" protection afforded to cable channels and other forms of pay television. Other content owners could be forced to make similar choices, with the end result being substantial harm to the country's current free television system.

We think that, absent carefully crafted rules to balance consumers' interests in remote access with copyright owners' interests in preserving the value of their content, the TiVo system is likely to give rise to "indiscriminate" redistribution of content. A TiVo-based redistribution system would be different in design from the system offered briefly by ICrave TV, where a single person made broadcast content available to thousands via a single Internet site (a scheme that we, the studios, and the networks successfully shut down via a copyright infringement suit). However, hundreds or thousands of TiVo subscribers making content available to up to 19 people each (as contemplated by TiVo's current proposal),

¹ Despite TiVo's suggestions to the contrary in the *Washington Post* and in filings in this docket, our technical experts confirm that it is possible to send a standard-definition NFL game using compression technology that is currently available (such as that used daily by DirecTV) to a distant location in "real time," using a generally available residential broadband internet access provider.

without standards that ensure those 19 people are (1) members of the TiVo subscriber's family or "normal circle of social acquaintances" (the standard for non-infringing use of copyrighted material under the Copyright Act), or (2) using the content only for their personal use and that of their families or normal circle of social acquaintances, would add up to widespread, and we believe "indiscriminate," redistribution very quickly.

Security, even if it is perfect, isn't enough. If even the most secure system permits an individual to provide 19 other households or third parties with access to its secure system, and thousands of these systems are in operation, indiscriminate redistribution will surely follow.

TiVo's technology is very promising. We think the FCC should adopt rules to govern how this kind of remote access can be done – and we believe it can be done in a way that does not open the door to widespread copyright infringement. But approving an *interim* technology before rules are in place to assure that it is not widely used to violate copyrights is not a good way to proceed.

In the first place, once the TiVo units are sold in the thousands, the Commission will not be able later to restrict access to its remote access or redistribution features in any meaningful way without reversing consumer expectations (although unfounded) and incipient patterns of TiVo redistribution. Yet the NFL believes that the technology will quickly generate widespread copyright infringement schemes that will compel the Commission to do so unless it is willing to let its technology approval rules effectively eviscerate copyright protection for broadcast content.

Second, once TiVo receives interim approval without remote access restrictions, the Commission cannot consistently hold the other 13 interim certification applicants being considered simultaneously with TiVo to the remote access restrictions they have voluntarily agreed to implement pending final rules. Otherwise the marketplace would, in the view of those 13 applicants, be unfairly skewed in TiVo's direction. Having 14 systems in the market that offer unrestricted remote access will make the Commission's task in implementing the future restrictions that we believe will be needed even more difficult, and will make the consumer firestorm that will result when the Commission takes the steps needed to protect broadcast content even larger.

TiVo has not said that interim proximity controls would harm its system – indeed, the other 13 applicants have voluntarily agreed to live with them pending the final rulemaking, and the NFL, the MPAA, and other content owners are prepared to discuss with TiVo how it could implement such controls with minimal disruption to its system at TiVo's early convenience. TiVo thus should not be

harm simply by waiting to roll out its new service. Once final rules are promulgated to define "affinity groups" in a manner consistent with the copyright laws; establish standards of due diligence that device manufacturers must meet to assure their systems are not used for copyright infringements (certifications as to personal relationships among affinity group members and the like); and require manufacturers to design and implement adequate security and information systems (for example, credit card verification systems requiring group members to be on a single credit card account, and information collection requirements to ensure that TiVo can help copyright holders identify and stop individuals who abuse its technology by infringing on copyrights), TiVo should be in a position to roll out its service quickly and on an equal footing with other applicants for Commission certification.

In this vein, I note that after we spoke yesterday, I discussed your points about credit cards being linked to particular TiVo accounts and limitations on the number of "dongles" per account with members of my staff who are more familiar than I with the details of TiVo's application. In light of the lack of specific information on these points in the application and the innovative techniques employed in the past in efforts to steal out-of-market NFL games, it unfortunately is clear to me that the staff-recommended safeguards proposed by TiVo (to which I believe you were alluding in our call) are wholly inadequate to address the NFL's concerns.

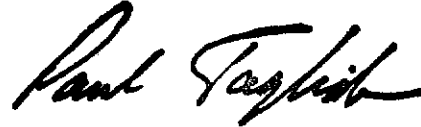
As noted above, the NFL believes that the staff's proposal to approve, without the benefit of a full rulemaking record, a technology that does not include proximity controls and therefore implicitly sanctions unrestricted distribution of copyrighted material is not wise as a matter of public policy. Moreover, the staff's position also seems to be sharply at odds with the positions that the U.S. Government has consistently taken in similar cases that require technological innovation to be balanced with the need for copyright protection. For example, when the Canadian government proposed a compulsory license for Internet retransmitters, the U.S. vigorously opposed the proposal through Commerce, State and the U.S. Trade Representative, each of which communicated our government's strong opposition directly to the Canadian government. In that case, and others, the government recognized the importance of protecting copyrights and acted accordingly.

We believe the same policy considerations apply here as well and should compel the FCC to use the pending rulemaking to set final rules for broadcast recording devices carefully to balance copyright imperatives with technological innovation, so that broadcast-flag-compliant systems do not inadvertently drive

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content away from broadcast television. In the meantime, we would urge the Commission to condition any approval of the TiVo interim proposal on an agreement to implement proximity controls.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Tagliabue", written in a cursive style.

PAUL TAGLIABUE

cc: Catherine Crutcher Bohigian, Esq.
MB Docket 04-63